IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAAREN A. NICHOLS, a single woman, Plaintiff, SANDRA RASMUSSEN, a single woman, Appellant, v. ARLO DAY and JANE DOE DAY, husband and wife and the marital community comprised thereof; ARLO DAY d/b/a ISLAND CONSTRUCTION; ISLAND CONSTRUCTION 1, INC., a Washington corporation; ACCREDITED SURETY AND CASUALTY COMPANY, INC. BOND NO. 10013708, a foreign surety, Respondent.	)	No. 62515-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 26, 2010

Appelwick, J. — Rasmussen and her mother, Nichols, sued contractor Day, his construction company, and his bond, for breach of contract and other claims. Rasmussen voluntarily dismissed. The trial court entered judgment on behalf of both Day and the surety, held by Accredited Surety and Casualty

Company, Inc., for attorney fees as the prevailing party under the construction bond statute's fee provision, RCW 18.27.040(6). Rasmussen contends that the defendants cannot be the prevailing party under the statute in the case of a nonsuit. Additionally, she argues the defendants have not prevailed, because the remaining plaintiff, Nichols, pursued all additional claims. Rasmussen contends that attorney fees accrued prior to the notice of appearance of the surety are not recoverable. The surety is properly characterized as the prevailing party after a voluntary dismissal. But, a contractor may not recover fees under this statute. We affirm the judgment in favor of Accredited and reverse the judgment in favor of Day.

FACTS

Sandra Rasmussen and her mother, Dr. Kaaren Nichols, entered into an agreement with contractor Arlo Day for work on their homes. The plaintiffs sued Day and his bond,[1] alleging breach of contract, defective construction work, breach of lease, and violations of the Consumer Protection Act (CPA), chapter 19.86 RCW. They sought recovery on the bond as part of the relief requested. After failing to respond to defendants' discovery requests, Rasmussen voluntarily dismissed. The trial court then awarded the defendants fees and costs against Rasmussen.

Rasmussen appeals the award.[2] Nichols subsequently pursued all claims alleged in the case and settled.

[1] Contractors such as Day are required to post a $12,000 bond. RCW 18.27.040(1).
[2] Only the September 18, 2008 award of fees and costs is under review. The court awarded additional fees to the defendants for defending against Rasmussen's subsequent motion for relief from fees. Rasmussen has not appealed the second fee award.

DISCUSSION

I. Prevailing Party

The parties first dispute whether the defendants can be a prevailing party under RCW 18.27.040(6) after Rasmussen's voluntary dismissal. Review of this question of law is de novo. Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 488, 200 P.3d 683 (2009). But, the trial court has the discretion in a voluntary dismissal case to decide whether the case is an appropriate one to award fees. See Walji v. Candyco, Inc., 57 Wn. App. 284, 290, 787 P.2d 946 (1990) (holding that the trial court did not abuse its discretion in interpreting "prevailing party" in a commercial lease fee provision to allow attorney fees given the facts of the case); see also Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 192–93, 69 P.3d 895 (2003) ("Whether or not to award the expenses following a voluntary nonsuit is within the discretion of the trial court, in light of the facts and circumstances of the entire case.").

The general rule in Washington is that a party in a civil action will pay its own attorney fees and costs. See Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296, 149 P.3d 666 (2006). But, a party is entitled to attorney fees if a contract, statute, or recognized ground of equity permits fee recovery. Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

The trial court awarded the defendants fees under the construction bond statute's fee provision, RCW 18.27.040(6). RCW 18.27.040(6) allows for an award of attorney fees to the prevailing party of certain actions brought against

contractors and their bonds. RCW 18.27.040(6);[3] see also Cosmopolitan, 159 Wn.2d at 306. The statute does not define "prevailing party." See RCW 18.27.010, .040(6). No cases have determined whether a defendant is a prevailing party after a voluntary dismissal under RCW 18.27.040(6). We must interpret the statute to determine whether the defendants are the prevailing party under RCW 18.27.040(6). The primary goal in statutory interpretation is to ascertain and give effect to the intent of the legislature. Nat'l Elec. Contactors Ass'n, Cascade Chapter v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999).

Andersen v. Gold Seal Vineyards, Inc., laid out the general rule that the defendant is regarded as having prevailed in voluntary nonsuits because the plaintiff "failed to prove [the] claim." 81 Wn.2d 863, 865, 868, 505 P.2d 790 (1973). Rasmussen disputes whether Andersen is still good law after Wachovia.

In Wachovia, the court addressed another statute, RCW 4.84.330. 165 Wn.2d at 488–89. RCW 4.84.330 contains a specific definition of "prevailing party." Id. at 489. It means the party in whose favor final judgment is rendered. Id. The court held that the statutory definition of "prevailing party" in RCW 4.84.330 precluded an award of fees to parties after voluntary dismissal, because there was no "final judgment." Id. at 494; see also Cork Insulation Sales Co. v. Torgeson, 54 Wn. App. 702, 706, 775 P.2d 970 (1989) (holding that a defendant could not be a prevailing party under RCW 4.84.250 after a voluntary dismissal under the specific definition of prevailing party contained in

[3] RCW 18.27.040(6) states, "The *prevailing party* in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees." (Emphasis added.)

RCW 4.84.270).

Wachovia did not alter the general rule of Anderson. That case simply found that the general rule of Andersen did not apply where a specific statutory definition varied the general rule.[4] Wachovia, 165 Wn.2d at 491. The court acknowledged that although the words "prevailing party" appear in many attorney fee provisions, "'prevailing party' is not defined in the same manner in every attorney fees statute." Id. at 488–89. If the Supreme Court intends to overrule a case, it will state so explicitly. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) ("We will not overrule such binding precedent sub silentio."). Absent such a statement, Andersen and subsequent cases relying on it are good law.[5] Wachovia, 165 Wn.2d at 491.

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[4] Wachovia abrogated Marassi v. Lau, 71 Wn. App. 912, 918–19, 859 P.2d 605 (1993), which held the defendant to be the prevailing party after a voluntary dismissal under RCW 4.84.330. Wachovia, 165 Wn.2d at 490. Wachovia also stated that Allahyari v. Carter Subaru, 78 Wn. App. 518, 522–24, 897 P.2d 413 (1995), improperly discussed with approval the Marassi reasoning, although the ultimate holding of Allahyari was not questioned. Wachovia, 165 Wn. App. at 490–91.

[5] Washington courts have applied the Andersen rule when interpreting similar statutes to the statute at issue. See, e.g., Council House, Inc. v. Hawk, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006) (defendant is the prevailing party for purposes of RCW 59.18.290 when plaintiff voluntarily dismisses case); Escude, 117 Wn. App. at 193 (defendant is the prevailing party for purposes of RCW 4.84.185 and CR 11 when plaintiff voluntarily dismisses case). Additionally, the Andersen rule has also been applied to contract provisions, finding the defendant to be the prevailing party after a voluntary dismissal. See Hawk v. Branjes, 97 Wn. App. 776, 781–82, 986 P.2d 841 (1999) (holding that contract fee provision allowing fees to the successful party authorized the award of fees to the defendant after voluntary nonsuit); Walji, 57 Wn. App. at 290 (interpreting "prevailing party" in a commercial lease fee provision to allow attorney fees after voluntary dismissal). While these cases all predate Wachovia, that case did not overrule them or Andersen.

Rasmussen's attempt to distinguish this case from precedent on the basis that here the claim was dismissed without prejudice fails. As noted previously, Andersen involved voluntary dismissals without prejudice, as did Walji and Council House.

Rasmussen incorrectly asserts that Escude and Council House (and Boeing v. Lee, 102 Wn. App. 552, 558, 8 P.3d 1064 (2000)) have been "overruled" by Wachovia, because they each rely on the reasoning of Walji and/or Andersen. As previously discussed, Andersen is still good law. Wachovia, 165 Wn.2d at 491. Wachovia did not abrogate Walji, in fact it discussed Walji without criticism except to say that it had been misapplied in Marassi and misstated in Allahyari. Wachovia, 165 Wn.2d at 490. The rule of Walji remains valid and the subsequent cases relying on it also stand.

Unlike Wachovia and Cork Insulation, there is no definition of prevailing party in this statute requiring variance from the general rule of Andersen. RCW 18.27.040(6). Therefore, we will apply the general rule that the defendant prevails in voluntary nonsuits, Andersen, 81 Wn.2d at 865, unless there is evidence that the legislature intended otherwise.

We must next consider whether the award of fees to the defendants after a voluntary dismissal is consistent with the purpose of the statute. Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). The purpose of chapter 18.27 RCW is "to afford protection to the public including all persons, firms, and corporations furnishing labor, materials, or equipment to a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors." RCW 18.27.140; see also Cosmopolitan, 159 Wn.2d at 297, 301–302. The plain language of the statute does not preclude a bond company from recovering fees, and clearly, it could have done so. No public purpose is served by imposing the burden of attorney fees for failed or withdrawn claims on the bond company. It is not against public policy for the bond company to recover fees. Therefore, awarding fees to the defendants here was consistent with the purpose of the statute even if not central to it.

Rasmussen contends that this case is distinguishable from previous cases, because only one party voluntarily dismissed, and because Nichols

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Rasmussen contends that fees can be awarded on voluntary dismissal only if the fee provision does not limit fee awards to the prevailing party. This is incorrect. See Council House, 136 Wn. App. at 159–60 (interpreting prevailing party in RCW 59.18.290); Escude, 117 Wn. App. at 193 (interpreting prevailing party in RCW 4.84.185); Walji, 57 Wn. App. at 290 (interpreting prevailing party in a commercial lease).

pursued every claim against the defendants. This is not material. Implicit in the determination of the prevailing party is the question of which claims are resolved and between whom. The presence of any other party whose claims are not resolved is of no consequence to this inquiry. But, the presence of other parties may come into play in segregating or apportioning the fees to be recovered. The purpose of allowing the defendant to be the prevailing party after a voluntary dismissal is to "inhibit frivolous or badly prepared lawsuits." Walji, 57 Wn. App. at 289. This purpose is served just as well when only one plaintiff dismisses her claim. Therefore, the fact that Nichols continued to pursue her claims does not prevent the application of Andersen's general rule against Rasmussen.

We hold that the definition of "prevailing party" under RCW 18.27.040(6) includes a defendant who prevails through voluntary dismissal.

II. Award of Fees

Rasmussen contends that, even if the defendants prevailed, the fees were not recoverable, because they were not incurred in defending the action against the bond. The trial court did not identify whether the fees incurred were in defense of the bond, the contractor, or both. Rasmussen contends that the statute does not authorize the recovery of fees incurred in defending a claim against the contractor, and allows fees only to defend the bond. Interpretation of the statute is a legal question we review de novo. Wachovia, 165 Wn.2d at 488.

The fee provision of the statute does not provide for recovery of attorney fees in an action solely against the contractor. RCW 18.27.040(6); see also

Cosmopolitan, 159 Wn.2d at 294. But, fees incurred in defending the suit against the contractor and the bond together may be recovered. The fee provision authorizes fee awards to "[t]he prevailing party in an action filed under this section *against the contractor and contractor's bond or deposit*, for breach of contract by a party to the construction contract . . . ." RCW 18.27.040(6) (emphasis added). The plain language of the statute indicates that the legislature contemplated that plaintiffs would bring actions against both the contractor and the bond.

Additionally, it is always necessary to establish the contractor's breach of contract in order to recover from the bond. See Cosmopolitan, 159 Wn.2d at 300–01. Because the statute is limited to actions for breach of contract by a party to the contract, RCW 18.27.040(6), defense of the contractor and the bond company will be identical. Limiting the fee provision to actions defended exclusively to defense of the bond would require each party to hire its own attorney to duplicate the defense. This would be contrary to the legislature's concern for reducing the cost for contractors to obtain bonds. Id. at 304–05. Additionally, it is within the trial court's discretion to award all of the fees incurred when there can be no meaningful distinction among the parties for claims. Bloor v. Fritz, 143 Wn. App. 718, 747, 180 P.3d 805 (2008). Therefore, while any fees incurred defending claims against the contractor alone may not be recovered, Cosmopolitan, 159 Wn.2d at 294, compensable fees and costs may be incurred while defending both the contractor and the bond simultaneously.

That said, mere derivative liability is not enough to presume that fees

were expended in defending the bond as well as the contractor. Cosmopolitan held that a trial court is not authorized under the statute to award fees where the action taken by counsel did not defend the bonding company. Cosmopolitan, 159 Wn.2d at 294. A trial court must determine that the expenses were in fact incurred while defending the bond in order for an award of fees to be authorized.

Here, the complaint was filed in November 2007. Counsel Brian Esler filed a notice of appearance for defendants Day, Jane Doe Day, and Island Construction in January 2008. Esler then performed the bulk of his work, mostly relating to discovery. Esler filed a notice of appearance on behalf of Accredited on July 7, 2008. The trial court granted Rasmussen's voluntary dismissal and awarded fees in September.[6]

Rasmussen challenged the fee award below on this same basis. Therefore, the trial court necessarily rejected this argument. The trial court was within its discretion to find that the fees incurred in discovery and otherwise, on behalf of the contractor prior to the notice of appearance by the bond company, nonetheless inured to the benefit of the bond.[7] The fee award was properly limited to those fees incurred with respect to Rasmussen.[8] The trial court did not abuse its discretion in determining the award of fees.

However, RCW 18.27.040(6) allows award of only those fees incurred in

[6] Rasmussen states that different counsel represented Accredited. The record indicates that Esler represented both parties below. Esler withdrew after this appeal was filed.
[7] The record does not contain Esler's contractual arrangements with either the contractor or bond company.
[8] Rasmussen conceded at oral argument that Esler properly limited his fee request to exclude fees expended only in defending Nichols's claims (for example, discovery requests propounded to Nichols).

defense of the bond. Cosmopolitan, 159 Wn.2d at 294. An award of attorney fees under the statute may not be made to Day. We affirm the award of fees to Accredited, and reverse an award, if any, to Day.

III. Fees and Costs on Appeal

Each party requests an award of fees on appeal under RAP 18.1. RAP 18.1 allows the award of fees on appeal if granted by applicable law. Day cannot be a prevailing party on appeal. Though he successfully defended the award of fees against Rasmussen, he cannot preserve his interest in that award. Similarly, Rasmussen may not have to pay fees to Day, but she has not prevailed in her effort to overturn the award of fees. Accredited is not represented here and has not filed a brief or otherwise appeared.[9] Fees cannot be awarded to the absent bond company, despite preserving its fee award through the efforts of its former counsel and insured.

We conclude no party is a prevailing party for purposes an award of fees on appeal. We award no fees.

We affirm as to Accredited, and reverse any award to Day.

[9] Rasmussen filed her opening appellate brief on February 17, 2009. Esler withdrew as Accredited's counsel on February 27, 2009. Esler filed the respondent's brief on April 20, 2009, at that point acting solely on behalf of Day. Esler did not represent Accredited when filing the respondent's brief. No separate brief was filed by any counsel on behalf of Accredited.

Appelwick, J.

WE CONCUR:

Cox, J.

Grosse, J.